Supreme Court of the United States.

No. 425. October Term, 1910.

Joseph E. Gay, *Appellant*,

v.

The Baltic Mining Company *et al.*

SUPPLEMENTARY BRIEF OF THE APPELLANT, JOSEPH E. GAY.

I.

It appears from the briefs and arguments on the first hearing of these cases that the radical question involved is the power of the National Government to impose a tax simply on the franchise, or (what is the same thing) the profits of the use of such franchise of corporations, public service or otherwise, whether or not engaged in interstate commerce, which are now created by the States; it being admitted that the States cannot tax in like manner corporations created by the Federal Government.

Stated most favorably the argument for the Government is that the present tax is uniformly imposed, not only on State corporations, but on Federal corporations of like nature. A sufficient reply to this is that a State law taxing both State and Federal corporations directly on their franchise without the permission of Congress would be, as to the Federal corporation so

taxed, quite as unconstitutional as a law taxing Federal corpora
tions only; indeed *McCulloch* v. *Maryland* so held on such
State law.

This, the position of the present appellees, has never bee
challenged except as it was suggested, *obiter*, by Chief Justic
MARSHALL in that case, that the Federal Government is a sov
ereignty of superior power to a State's, — even in those matter
that belong clearly to the State's domain and which are reasonabl
necessary for its prosperity or the well-being and the liberties o
its people and which have never been surrendered to the Feder
Government. But one other dictum can be cited in support o
this proposition, and only once does the Government claim tha
it may have been covered by a case decided. So we have, for th
Government's only authorities on this point (1), MARSHALL
words in 4 Wheaton, 435, "The difference is that which alway
exists and always must exist between the action of the whole on
part and the action of a part on the whole." — But the whole rang
of decisions of this honorable Court since *McCulloch* v. *Maryla*
is to deny the accuracy of the view which conceives the State b
as *a part* of the Federal Government; and MARSHALL himself,
the end of the sentence, seems to admit that a State Governmen
when not in opposition to Federal law, is as supreme as is t
Federal Government in its own domain; and furthermore, h
very next paragraph admits his doubt of the right of Congress to t
the State banks. (2), CHASE'S words in *Veazie Bank* v. *Fen*
(8 Wall. 547) — "it cannot be admitted that franchises granted
a State are necessarily exempt from taxation; for franchises
property, often very valuable and productive property; and wh
not conferred for the purpose of giving effect to some reserv
power of a State, seem to be as properly objects of taxation
any other property;" — words entirely unnecessary to the de
sion and which indeed but serve to indicate the doubt in his o

mind — for after all what is the reserved power of the State? Moreover, it is evident that he is thinking of a franchise in the ordinary use of the word, such as a franchise to maintain a railway in a street, and not of the bare franchise to be a corporation; and in the very next sentence he hastens to say — "But in the case before us the object of taxation *is not the franchise of the bank.*" (3), The case of *Railroad* v. *Collector* (100 U.S. 595). But here the constitutional point was not raised; the tax was considered a tax upon the income of the company or in this instance upon the property of a non-resident alien, and resisted solely upon that ground; and the corporations taxed were, as a matter of fact, interstate commerce corporations. (We make no question of the power of the Federal Government to impose taxes upon corporations, State or National, engaged in interstate commerce, or even to prohibit the right of the States to charter corporations for such purpose.) Moreover, the Court, speaking through Mr. *Justice* MILLER (p. 599), said: "the tax is laid by Congress on the net earnings, which are the results of the business of the corporation;" and on page 596, "the case is of little consequence as regards any principle involved in it as a rule of future action."

Now MARSHALL'S words in *McCulloch* v. *Maryland* were spoken *obiter* in the heat of what might almost be called a judicial argument supporting Federal power, at a time when the great interpreter of the Constitution was above all anxious to make no admissions which might later embarrass his theories of the Constitution. They are as unnecessary to the decision as *Chief Justice* TANEY'S constitutional argument in the Dred Scott case (19 Howard, 431–452), and they are immediately followed by MARSHALL'S admission that the power to create corporations is necessary to sovereignty (4 Wheaton, p. 410).

It is true that against these guarded claims of MARSHALL and CHASE or, more accurately, their reservation of a future right to

claim this power if necessary, we have no decided case; for Congress has never until now attempted to tax the franchise of a State corporation.

It comes up, therefore, as a new question, as new as the question then was which MARSHALL was considering in *McCulloch* v. *Maryland;* a new question and one of transcending importance to the people and the States, not, indeed, as a revenue question, but as one of the State's autonomy. We respectfully urge that upon such a matter this Court will consider, not indeed the ultimate motives of Congress and the President in enacting this legislation, but its necessary and obvious consequences, both to the people, to the States and to their relation to the Federal Government; and that it will also consider the words spoken by this Court, through nearly all its Justices, in the many cases decided in the ninety years that have elapsed since *McCulloch* v. *Maryland* was decided, whereby it is apparent that had such a law been directly in question the opinion of this Court would have been against the constitutional power to enact it.

The general power of taxation of the Federal Government is unlimited. The title of the 31st letter in the Federalist is, "Unlimited National Taxation not a Road to Despotism." But Hamilton himself says that the Federal Government must be invested with an unqualified power of taxation only "in the ordinary modes." Is the power nakedly to tax a state corporation franchise which might — and may — be so exercised as to deprive the people of the right to do business in their State under a corporate form, and the States themselves of creating corporations for any purpose, an *ordinary* mode?

For although to-day the law taxes Federal and State corporations equally, to-morrow it may remit the tax on the former and make the latter prohibitive — as it has once in our history already done — but then under an expressed Federal power, that

of regulating the currency. In the Veazie Bank case, indeed, the tax was not upon a state franchise, but upon a comparatively small part of the business done under that franchise; yet that case remains the great historic instance of the use by the Federal Government of the power to tax as the power to destroy. Justices Nelson and Davis, indeed, dissented; they would not admit that even an express Federal power gave the right to invade and destroy a reserved power of the States. Their words (8 Wallace, 554, 555) remain uncontradicted on this point, — for the majority opinion expressly declares (8 Wallace, 547) that — "the object of taxation is not the *franchise* of the Bank." So again where they say (p. 556), "This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the Government, or in the opinions of the illustrious statesmen who founded it" — these words were unchallenged in the majority opinion, which is based simply on the express power given in Article I., Section 8, Clauses 2, 5, of the Constitution.

One can hardly, without apology, venture to remind this honorable Court of a few of the cases in which it has held that the States are not subordinate, not "a part" of the Federal Government in the sense of being a part of a homogeneity, but are sovereignties of equal dignity, indestructible, equally important, and in their own demesne equally supreme.

By *Chief Justice* CHASE himself in *Texas* v. *White* (7 Wall. 700, 725): "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or the right of self-government by the States. . . . We have already had occasion to remark at this term, that the 'people of

each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

And again, in *Lane County* v. *Oregon* (7 Wall. 71, 76), he says: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. . . . Now to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. . . . It is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered."

By *Mr. Justice* NELSON in *Bank of Commerce* v. *New York City* (2 Black, 620, 633): "That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. . . . it is only by a wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. . . . Each is sovereign and independent in its

sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and, influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

By *Chief Justice* FULLER in *Pollock* v. *Farmers Loan & Trust Co.* (157 U.S. 429, 583, 584): "The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." And he concludes with approval of *Mr. Justice* NELSON'S words in *Collector* v. *Day* (11 Wall. 113, at p. 124): "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." And again (p. 126): "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality. . . . And it will be noted that this opinion affirms the opinion of *Mr. Justice* CLIFFORD in the Lower Court, cited at length in the brief of Messrs. Evarts & Wardner in (old) No. 747 *Flint* v. *Stone Tracy Co.* (p. 32), from 3 Clifford, 389: "The proposition of the defendant is in substance and effect

that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." So, in *Dobbins* v. *Commissioners* (16 Peters, 435), by *Justice* WAYNE (p. 447): "Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject, by express prohibitions in the Constitution. And the States, by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power, delegated to the United States."

By GRAY, J., in *Van Brocklin* v. *Tenn.* (117 U.S. 151, 155),

quoting the thrice-repeated words of Marshall from *Weston* v. *Charleston* (2 Pet. 449, 467): "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; . . . The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another;" and on page 177 *Mr. Justice* GRAY himself says: "this Court has held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." Of the two great text writers, Story in his early editions, quoting No. 31 of the Federalist (Constitution of the United States, Third Edition, Vol. 1, p. 655) says: "It is not true, because the exigencies of the union may not be susceptible of limitation, that its power of taxation ought to be unconfined. Revenue is as requisite to the purposes of the local administrations as to those of the union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary that the State Government should be able to command the means of supplying their wants as that the National Government should possess the like faculty in respect to the wants of the union. But an indefinite power in the latter might, and probably would in time, deprive the former of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. . . . It might at any time abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenue; and thus all the resources

of taxation might by degrees become the subjects of Federal monopoly, to the entire exclusion and destruction of the State governments." But he merely then (p. 721) copies MARSHALL'S words without comment, and concludes (p. 726) that Congress may, without doubt, tax State banks; "when Congress taxes the chartered institutions of the State they tax their own constituents;" but the later editions query this, citing the cases of *Thompson* v. *Pacific R.R.* (9 Wall. 579) and *National Bank* v. *Commonwealth* (9 Wall. 353). In the former case *Chief Justice* CHASE says (p. 588), combatting the view that the railroad was free even from taxation on its property by the State, "the case of *McCulloch* v. *Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the Court in that case will hardly warrant the conclusion which counsel deduce from it in this . . . (p. 589). It must be remembered that the Bank of the United States was a corporation created by the United States. . . . It did not owe its existence or any of its qualities to State legislation, and its exemption from taxation was put upon this ground . . . (p. 590). It is true that some of the reasoning in the case of *McCulloch* v. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the Bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States."

On the other hand, Cooley (Constitutional Law, 3d edition, p. 61) holds a different opinion: "The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each, with all its constitutional powers, unembarrassed and unimpaired by any action of the other. . . . It is true that taxation does not necessarily and unavoidably destroy, and

that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon State powers, and by implication forbids them."

Even the Government, in its brief (pp. 33, 34), seems to admit that if the classification of this law is based solely on a State franchise it is invalid: "The importance of the difference proceeds, not from the presence or absence of franchises, but from the wide and important diversity of legal rules affecting the two kinds of business."

In *Railroad Co.* v. *Peniston* (18 Wall. 5, 35), *Mr. Justice* STRONG in discussing *McCulloch* v. *Maryland* uses the words: "The tax, therefore, was not upon any property of the bank, but upon one of its operations, in fact, *upon its right to exist as created.*" And just below, in discussing *Osborn* v. *U.S. Bank* he says: "the tax held unconstitutional was a tax upon the existence of the bank — upon its right to transact business within the State of Ohio."

In *United States* v. *Railroad Company* (17 Wall. 322, 332), *Mr. Justice* HUNT anticipates the doctrine of *South Carolina* v. *United States*, so much relied upon in the brief for the Government: "We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an indi-

vidual could occupy with equal propriety." Thus early was the doctrine of that case distinguished.

And this franchise of being a corporation, although subject to separate taxation (*Horn Silver Mining Company* v. *New York*, 143 U.S. 305), can only be taxed by the State creating it or by another State as a preliminary to doing business therein; but not even then if an interstate commerce corporation. Of such nature are all the taxes imposed in Delaware Railroad Tax case, (18 Wall. 208), and the other cases cited on pages 11, 12 of Messrs. Guthrie, Morawetz and Van Sinderen's brief for the Home Life Insurance Company in behalf of this contention of the Government.

Mr. Justice FIELD in *Pembina Mining Company* v. *Pennsylvania* (125 U.S. 181, 186), says: "We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her,"— implying that it would be if it were so.

Is there anything in the reasoning of *Mr. Justice* BRADLEY in *California* v. *Pacific R.R.* (127 U.S. 1, 40–41) which indicates that it is to be applied to the State Government taxing a Federal corporate franchise and not to the converse proposition? "Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. . . . It seems very clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? . . . a franchise is a right, privilege or power of

public concern, which ought not to be exercised by private individuals at their mere will and pleasure. . . . Under our system their existence and disposal are under the control of the legislative department of the Government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Much argument is made on the point that a tax on the income or traffic made under the franchise is different from a tax on the franchise, but this Court has decided otherwise. It is quite sufficient to cite two famous cases. In *Osborn* v. *Bank of the U.S.* (9 Wheaton, 738), where, by the way, Mr. Hammond for the appellants (p. 773) argued that "the mere creation of a corporation does not confer political power or political character," MARSHALL himself, after remarking (p. 860): "That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation" — which remark has a distinct bearing on the ultimate motive of this legislation — held that even a tax of a fixed sum upon each office of the Bank is a tax upon the franchise of the Bank, saying (p. 862): "This distinction, then, has no real existence. To tax its faculties, its trade, and occupation, is to tax the Bank itself? To destroy or preserve the one is to destroy or preserve the other." But on this point nothing can be added to the conclusive argu-

ment of Senator Cummins, quoted and italicized below: "I am unable to distinguish a tax upon the business of a corporation simply because it is a corporation from a tax upon the right of a corporation to do business." The Solicitor-General orally argued that the tax was not on the franchise, but on the business or use of the franchise; and so Mr. Guthrie, in his brief in favor of the law, *Hine* v. *Home Life Insurance Company* (p. 5), says: "The argument that a state, by authorizing individuals to form a corporation, can exempt them from the power of Congress to impose an excise tax upon their private business does not require serious consideration." We think it does. If this were "an excise tax upon their private business," we should have no objection to the law except that it does not give the equal protection of the law to all groups of persons engaged in such business. But in last analysis the Government's case rests on the proposition that it is an excise tax upon the public business of being a corporation, only disguised by the device of adding thereto "associations organized for profit and having a capital stock represented by shares."

In *Home Insurance Company* v. *New York* (134 U.S. 594) it was decided that a tax imposed by State statute upon the corporate franchise or business of all corporations incorporated under any law of the State or of any other State or country and doing business within the State, measured by the extent of the dividends of the corporation, is a tax upon the right or privilege to be a corporation, and is not a tax upon the privilege or franchise enjoyed by the company as a going concern; *Mr. Justice* FIELD holding (p. 599) that it was not a tax upon the capital stock of the corporation, but upon the corporate franchise, and he defines this as being "The right or privilege to be a corporation . . . by which several individuals may unite themselves under a common name and act as a single person, with a succession of mem-

bers, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State."

The opinion of Congress itself as to the nature of the tax, and the opinions of Senators learned in the law as to its constitutionality, may perhaps now be referred to. Senator CLAPP (*Congressional Record*, Vol. 44, p. 3877): "The President in his message transmitted to Congress a few days ago suggested the propriety of an excise tax on the privilege of being incorporated."

Senator NEWLANDS, quoting Senator ALDRICH and Senator WHITE (*Congressional Record*, Vol. 44, p. 3758):

"Mr. ALDRICH: 'Mr. President, does the Senator from California mean to be understood as saying that the Government of the United States has ever taxed corporations as corporations at any time in its history?'

"Mr. WHITE: 'I mean to say that in the revenue law enacted during the war, Congress taxed corporations organized in the various States, and I shall in a moment turn to the section to which I allude. . . .'

"Mr. ALDRICH: 'I was not calling the Senator's attention to the transportation tax, but to that part of the amendments of the majority of the committee which proposes to tax corporations as corporations, as distinctive entities, without regard to whether they are engaged in one kind of occupation, industry, or business, or another.'

"Mr. WHITE: 'I am discussing all the provisions of the bill regarding the taxation of corporations. I say, and the Senator from Rhode Island will not deny it, that during the war we taxed corporations a percentage largely in advance of that proposed in this bill upon their gross receipts.'

"Mr. ALDRICH: 'We undoubtedly taxed certain industries, occupations and employments; and if corporations were engaged

in those industries, occupations or employments, they paid their taxes as individuals paid them. But this is the first attempt in the history of the Government to tax corporations as corporations.'"

By Senator CUMMINS (*Congressional Record*, Vol. 44, p. 3978): "I do not believe that there is any decision of the Supreme Court that sustains the amendment. If so, it has never been brought to my attention, and my investigation has not been casual or superficial. I know that the President of the United States has been led to believe that this decision is the one which will enable the law to escape the condemnation of the Pollock case. I know it not only through his message delivered to Congress, but I know it in another way which I do not choose to pursue. . . .

"I would not be here insisting upon the unfairness of this amendment if it imposed a tax upon the incomes of all persons and corporations. I would not be here opposing it at least on this basis if it imposed a tax upon all persons, firms, corporations, and companies doing business in the United States, for then there would be some pretence of equality and fairness, some defence for laying the hand of the law upon business and extracting a part of its profits or income. . . .

"I believe it would be unconstitutional to impose an excise tax on the business only of individuals, because that would create the very same discrimination that is created here. When you levy an excise tax upon business or occupation, it must be levied upon these persons, whether they are natural or artificial, who carry on that business. . . .

"The Senator from Michigan suggests that it might be done as a matter of police regulation. Of course that leads me to another point. If this tax is intended not to create a revenue, but if it is intended for the purpose of supervising and regulating corporations, that is quite a different proposition. I should like

to know before we get through with this whether it proposed through this tax to impose supervisory regulations upon all the corporations of the United States, to determine when and how they shall issue capital stock, when and how they shall issue evidences of indebtedness, what their business shall be, and all other things that concern or pertain to the business of the country. . . .

" . . . there is in the message and in some suggestions since, just a faint premonition, I can feel it in my bones, that one of the things which will be relied upon to sustain this tax is that it will enable the General Government to reach out and seize for regulation and supervision every corporation that has been organized in the forty-six States of the Union. . . .

"This case (the McClain case), Senators, has no more bearing upon the amendment which is now proposed than has the Pollock case. It is simply a tax levied upon certain persons, firms, and companies carrying on a named business. To make this case pertinent, you must hold that the business which is taxed under this law is the business of being a corporation. That is the only uniform thing in the classification, the business of being a corporation; and when you attempt to tax the business of being a corporation you are taxing the franchise, or the right to exist, and your law is not worth the paper upon which it is written."

Senator Cummins repeats this view in debate July 2, 1909 (*Congressional Record*, Vol. 44, p. 4040):

" . . . I would hold that it is a tax upon the franchise of the corporations, that it is a tax upon the business of the corporations, simply because they are corporations, and *I am unable to distinguish a tax upon the business of a corporation simply because it is a corporation from a tax upon the right of the corporation to do business. It may be that there are minds here so keen and penetrating as to discern some difference between these two*

things, but I cannot. I grant that Congress has the power to levy a tax on any business, upon any occupation. I grant it has the power to levy a tax upon any profession. But it has been the habit, heretofore, when Congress wanted to levy a tax on business, to specify the business upon which the tax was to be laid. It has been supposed that the business thus selected and segregated from other kinds of business was a business that was peculiarly fit to be taxed as Congress might direct. But when you group all the business of the United States into one law, and simply say that there shall be a tax laid upon all the business, then if you add to that the statement that it is to be laid only on business done by corporations of the country, you have in effect not levied a tax upon business or upon the carrying on of business, but you have levied a tax upon a corporation, upon the right, the privilege of a corporation to do business at all. That would be my interpretation of this statute."

Other leading Senators, eminent in the legal profession, took a similar view, and eleven pages of the *Congressional Record* (Vol. 44, pp. 4052 to 4063) are devoted to protests against the measure, which finally passed only by a vote of forty-five out of a total of ninety-two; less than a majority. Sixteen Senators never voted.

II.

This leads us to the larger question to which we are directed by the message of the President recommending the tax and by the Journals of Congress: the natural consequences of this scheme of legislation.

The President's message of June 16, 1909 (*Congressional Record*, Vol. 44, p. 3344), in which the law in question had its absolute inception, begins by approving the graduated inheritance tax, which was already a part of the House bill. This later was abandoned. It next goes on to advise against an income tax, except after a constitutional amendment. This advice was followed. Thirdly (marked "*second*" in the message), it recommends an excise tax of two per cent on all corporations and joint stock companies, except national banks (otherwise taxed), savings banks and building and loan associations, described as "*an excise tax upon the privilege of doing business as an artificial entity.*" This is in substance the present law, except that the amount of the tax was reduced to one per cent and the law extended to include associations "having a capital stock represented by shares, and every insurance company." Then the President's message closes as follows: "Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and

profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power."

Under the "Additional Regulations of the United States Treasury Department Relative to the Federal Corporation Tax Returns" promulgated November 25, 1910, by the Secretary of the Treasury, and approved on the same day by the President, we are informed that "Companies organized in Porto Rico and not engaged in business in the United States not subject to tax" (par. 21).

That under an opinion of the Attorney-General, "Limited partnerships, if organized for profit and having a capital stock represented by shares, although no 'certificates of stock' are issued, are liable to the tax imposed" (par. 29).

"Receipts during year from lands sold on installment to be included in gross income for that year" (par. 41).

That under the opinion of the Attorney-General, "As the tax imposed is measured by and is not a tax upon the net receipts of corporations, etc., interest received during the year on Government bonds is not proper deduction from such income in determining the amount of tax due" (par. 67).

That "Depreciation in value of mines by the removal of ore, if not otherwise ascertainable, may be prorated as in the case of sales of capital assets" (par. 72) (which seems irreconcilable with paragraph 41 above).

That under the opinion of the Attorney-General, promulgated April 4, 1910: "It appears that there are in Massachusetts, and perhaps elsewhere, various organizations known as 'associates,' 'trusts,' or 'real estate trusts,' which are not organized under a charter but are formed by an agreement and declaration of trust. It appears that the title to the property or business owned or operated by these organizations is vested in one or more trustees,

and certificates are issued to parties in interest as are shares of stock of incorporated concerns, the certificates being traded in as are shares of stock and the trustees being elected and their successors chosen as are directors in any corporation regularly chartered. The organization is one for profit and it possesses all of the essential elements of any joint stock company.

"In reply to a request from the Secretary of the Treasury as to the status of these organizations, in regard to the corporation excise-tax provisions of the tariff act of August 5, 1909, the honorable Attorney-General advises that these concerns are joint stock companies or associations organized for profit and having a capital stock represented by shares and are amenable to the provisions of the corporation excise-tax law."

That under an order of the Secretary of the Treasury, promulgated November 25, 1910, and approved by the President on the same day:

"3. The returns of the following corporations shall be open to the inspection of any person upon written application to the Secretary of the Treasury, which application shall set forth briefly and succinctly all facts necessary to enable the Secretary to act upon the request:

"(*a.*) The returns of all companies whose stock is listed upon any duly organized and recognized stock exchange within the United States, for the purpose of having its shares dealt in by the public generally.

"(*b.*) All corporations whose stock is advertised in the press or offered to the public by the corporation itself for sale. In case of doubt as to whether any company falls within the classification above, the person desiring to see such return should make application, supported by advertisements, prospectus, or such other evidence as he may deem proper to establish the fact

that the stock of such corporation is offered for general public sale.

"Returns can be seen only in the office of the Commissioner of Internal Revenue, in Washington, D.C. In no case shall any collector, or any other internal revenue officer outside of the Treasury Department in Washington, permit to be seen any return or furnish any information whatsoever relative to any return or any information secured by him in his official capacity relating to such return.

"No provision is made in the law for furnishing a copy of any return to any person, and no copy of any return will be furnished except to the corporation making the return, or its duly constituted attorney."

The working of the law is excellently shown by the above extracts.

Its actual result in its first year (as shown in the annual report of the United States Commissioner of Internal Revenue) was to collect a tax upon a net income of $3,125,481,101 on a capital stock of $52,371,626,752 from 262,490 corporations, having a total interest-bearing debt of $21,383,952,696. 29,812 of these were "financial" corporations with a capital stock of $2,723,954,639, a debt of $2,404,299,252, and a net income of $394,747,699. 24,252 were public service corporations with a capital stock of $18,902,060,130, debt $17,472,398,675, and net income of $808,960,581; the balance, or 207,826 corporations, were apparently ordinary industrial and mercantile business corporations or associations.

Now this total net income amounts to nearly $40 per capita of the continental population of the United States; or, counting five to a family, $200 per year for every American family is shown to be the net revenue of corporations affected by this act accruing to their stockholders; which, according to the census returns, is

about forty per cent of the entire earnings of the average family, the latter being only, as a rule, about $500 a year. The enormous importance of this legislation is thus shown. These earnings are ultimately nearly all distributed among the individual persons of the United States; even if passed through holding companies or insurance companies the people become the ultimate beneficiaries. The effect of the law, therefore, is to place that proportion of the total business or earnings of the country, not only under the direct taxing power of the Federal Government, but into its power to control, regulate, and finally to destroy or remove from State jurisdiction. That the provisions for publicity (3 (*a*) above) are most excellent, and correspond to the most enlightened modern thought, does not alter their unconstitutionality as applied to any but corporations doing an interstate commerce business, or enjoying a Federal charter.

The power to charter incorporations, the privilege of doing business under a corporate form, was never lightly regarded. It is an important flower of sovereignty; also the necessary right of the individual to-day, whether he earn his bread by his own trade or labor, or depend on the income of invested property.

"Over no subject is it more important for the interests and welfare of a State that it should have control than over corporations doing business within its limits. By the decision now rendered, congressional legislation can take this control from the State, and even thrust within its borders corporations of other States in no way responsible to it." *Mr. Justice* FIELD in the *Pensacola Tel. Co.* v. *West, etc., Tel. Co.* (96 U.S. 1, pp. 23, 24).

It is true that these words are in a dissenting opinion, but the majority only differed in that they held that this argument did not apply to a corporation engaged in interstate commerce. And so, under this present law, both the State's power to tax, and,

more important yet, the State's police power as well as the jurisdiction of its courts may fall before the Federal power. *Mr. Justice* FIELD'S words in *Paul* v. *Virginia* (8 Wall. 168 at pp. 181, 182) will cease to be true:

"Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank of Augusta* v. *Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even, by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

"If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States.

At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

"If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal."

Substitute the words "federal corporation" for "incorporation of another State" and the whole argument is applicable here.

It is, of course, no answer to say that the Congress may relegate to the States the power to tax such Federal corporations, may subject them to the jurisdiction of their courts, and may even put them under their entire police power; we have no right to assume that they will do so, nor, obviously, is the case so in fact: for they are *already* being taxed by the Federal Government, and the official documents above quoted clearly show that it is *already* the intent of the law, by a system of publicity, uniformity of accounts and prescribed regulations, to subject all State corporations to a Federal standard.

We submit that, except in the case of interstate commerce corporations, this cannot be done.

III.

The argument that the tax is, after all, an income tax imposed on corporations and associations, whatever Congress intended, and invalid as such, referred to in our original brief, has been ably covered in the briefs filed in the other cases; notably that in (old) No. 767, *Jared* v. *American Multigraph Co.*, and in the brief supporting the contention of the Government that the law is constitutional, filed in (old) No. 752, *Hine* v. *Home Life Insurance Company*. If some other ground of the classification be sought to justify the law than that of an excise on a corporate charter or an income tax levied only on certain kinds of corporations, we again submit that it can only be on the mere quality of divisibility. It is urged by the Government that there is something taxable in the assignability of shares, but the common law recognizes co-ownership and part ownership; indeed, in many cases creates it; such shares are constitutionally assignable, and it is certainly not due process of law directly or indirectly to tax the owner of two parts more than the owner of the whole.

"Where there is want of constitutional power to tax a particular object neither a direct nor an indirect tax can be imposed, since the power to tax is the power to destroy." *Mr. Justice* WHITE in *Snyder* v. *Bettman* (190 U.S. 249, 259).

We repeat that no argument can be based on a classification that a property or business is assignable, for all property is assignable; nor on that that it is assignable in shares or fractions. Yet the ruling of the Government cited above that "Limited partnerships, if organized for profit and having a capital stock represented by shares, although no 'certificates of stock' are issued, are liable to the tax imposed," shows that the law reaches even to that extent.

IV.

The question of the power of this Court, on the complaint o a private citizen, to examine into the records of Congress for the purpose of ascertaining whether the corporation tax provision o the tariff act (Section 38) originated in the House of Representa tives, pursuant to Article I., Section 7, Clause 1 of the Federa Constitution, has been hitherto expressly left undecided by this Court (*Twin City National Bank* v. *Nebeker*, 167 U.S. 196 203). And this position seems to have been reaffirmed in the recent case of *Millard* v. *Roberts* (202 U.S. 429 at p. 438).

It is urged by the Government in its supplementary brief filed after the previous argument of these cases, that the Senate has from the earliest times exercised its power of freely amending revenue bills in this manner, *i.e.*, by striking out certain pro visions in a bill as submitted to it by the House and by substi tuting wholly new provisions in their place. But that the exercise of this power has hitherto been unquestioned by any private citizen, furnishes no valid reason why the question of the exist ence of the power in the Senate under the Federal Constitution should not now be decided by the Court on the petition of a private citizen. The failure of others to object in times past cannot operate as a forfeiture of the present right of these com plainants to object and have the question decided by the Court, if it appears that an express provision of the Constitution may have been violated.

It is obvious from an examination of English Parliamentary history that Article I., Section 7, Clause 1 of the Federal Consti tution was inserted therein to make certain the right of that branch of Congress *nearest the people* to institute legislation which would in its operation increase the financial burdens of the citizens, a right which had not been wholly conceded to the English House

of Commons, and the denial of which by the House of Lords had been the source of much complaint; and that the founders of this Government, having before them the lessons of English history in this respect, intended that the House of Representatives should exercise this right in its broadest sense, and be free from the necessity of enacting, by way of compromise or otherwise, any revenue legislation originating in the Senate — the very necessity which arose in the passage of this corporation tax provision by the House of Representatives.

If the contention of the Government is sound, viz.: that the corporation tax provisions of the tariff act did, in fact, originate in the House of Representatives, then for the future no limit can logically be set to the right of the Senate to originate revenue legislation, using the same means as were used by the Senate in securing the passage of this corporation tax; and the limited constitutional right of the Senate to amend revenue bills or to concur in their passage by the House of Representatives becomes at once the far more extensive right to *originate and substitute* wholly new revenue bills which, if subsequently accepted by the House of Representatives, become law, notwithstanding the fact that these bills did not have their origin in the House of Representatives, as provided by the Constitution.

We believe that Article I., Section 5, Clause 3 of the Federal Constitution, requiring each House of Congress to keep a journal of its proceedings, was inserted to insure the passage of laws in a manner conformable to all constitutional requirements. Thus, we venture to add hereto various extracts from both Senate and House records on the subject of the corporation tax.

This corporation tax provision first appears as an "amendment" to the tariff bill sent to the Senate by the House of Representatives for concurrence (H.R. 1438) and was reported by Mr.

Aldrich for the Committee on Finance (*Congressional Record*, Vol. 44, p. 3836). Now this is a new section, "Section 4:" "That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company shall . . ." etc. That this was an entirely new matter appears in several places. (*Congressional Record*, Vol. 44, p. 3877), Mr. Clapp:

"The President in his message transmitted to Congress a few days ago the propriety of an excise tax on the privilege of being incorporated." The Senate insisted on its corporation tax amendment and sent it to conference without waiting for disagreement by the House.

Mr. Aldrich and Mr. Bailey (*Congressional Record*, Vol. 44, p. 4316):

"Mr. ALDRICH: 'I move that the Senate insist upon its amendments to the bill and ask for a conference with the House of Representatives upon the bill and amendments.'

"Mr. BAILEY: 'I submit that the question is not in order, because the House has not yet disagreed to the amendments, and we should at least show the House the courtesy of allowing it to express itself before we insist upon our amendments.'" (See also Senator Flint's argument, Vol. 44, pp. 3936).

To illustrate the feeling of certain members of the House of Representatives on the legality of the origin of this corporation tax provision, we quote Mr. Payne, whose name the tariff act (H.R. 1438) bears:

"Mr. Speaker, when the fathers put into the Constitution the provision that bills raising revenue must originate in this House, I think they meant something more than the latter day interpretation has put upon that part of the Constitution. I think they intended germane amendments. I do not believe it entered into their ideas that the House should simply prevent all legislation

being enacted, raising revenue, without they sent in a bill of some kind; but they meant that when the House sent in a bill relating to specific objects the Senate should have the right to amend it in reference to those objects" (*Congressional Record*, Vol. 44, p. 4384 .

We may add in conclusion that it is matter of common political knowledge that the House of Representatives never had any opportunity to vote separately upon the corporation tax provision of the tariff act, being obliged to accept this substitution by the Senate in order to secure the passage of the remainder of the tariff bill.

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HARRIS LIVERMORE,
J. GRANT FORBES,
Of Counsel.

Supreme Court of the United States.

No. 425. October Term, 1910.

Joseph E. Gay, *Appellant*,

v.

The Baltic Mining Company *et al.*

SUPPLEMENTAL BRIEF OF THE APPELLANT, JOSEPH E. GAY.

IN REPLY.

As the Government, in its original brief (pp. 37, 38 *et seq.*), seeks to maintain the constitutionality of the tax in so far as it is a tax upon associations or stock companies "having a capital represented by shares" and for that contention relies principally on decisions of the Supreme Court of Massachusetts which have upheld a state franchise tax on the franchises of corporations created by the State,

> *Portland Bank* v. *Apthorp*, 12 Mass. 252.
> *Connecticut Mutual Life Insurance Co.* v. *Commonwealth*, 133 Mass. 161, 162, 163.
> *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen, 298, 300–306.
> *Commonwealth* v. *People's Savings Bank*, 5 Allen, 428.

The same has been held as to a foreign corporation in a case not yet reported, —

> *Commonwealth* v. *Baltic Mining Co.* (Supreme Court of Massachusetts, January, 1911).

This appellant, while fully admitting such power of taxation in the State which creates the corporation, or over the corporation of another State which it admits to the privileges of its laws and the advantages of its markets, as shown in the above cases, reiterates his contention that the law cannot be sustained as a tax upon the mere right to do business with "a capital stock represented by shares." And this is expressly decided in certain cases not cited in the Government's brief, but which discussed and distinguish *Portland Bank* v. *Apthorp, supra,* and the other cases therein cited on this point, and to these later cases he now prays leave to invite the attention of this Honorable Court, and particularly in support of the third paragraph of his supplementary brief and the fourth paragraph of his original brief that the mere quality of divisibility is not constitutionally taxable.

Gleason v. *McKay,* 134 Mass. 419.

This case was brought to determine the constitutionality of a statute of Massachusetts imposing a tax upon the shares of such associations, not corporations, having stock represented by assignable shares. (Mass. Statutes 1878, c. 275.) This statute, it is especially significant to note, was an amendment or addition to the original statute (Mass. Statutes 1865, c. 283), which merely provided for such a tax upon the shares of *cor-*

porations chartered by the Commonwealth of Massachusetts. Section 1 reads as follows: —

> "Chapter two hundred and eighty-three of the acts of the year one thousand eight hundred and sixty-five, and the acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter two hundred and eighty-three shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

In a unanimous decision the Court, by MORTON, *C.J.*, held the statute unconstitutional:

> "The Legislature is given the power 'to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth,' and also power 'to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same.' Const. Mass., c. 1, art. 4.
>
> "It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this.

It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. . . .

"It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the term 'commodities,' in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the Legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the Legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or *quasi* public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license.

Portland Bank v. *Apthorp*, 12 Mass. 252.
Commonwealth v. *People's Five Cents Savings Bank*, 5 Allen, 428.
Commonwealth v. *Hamilton Manufacturing Co.*, 12 Allen, 298.

Commonwealth v. *Cary Improvement Co.*, 98 Mass. 19.
Connecticut Ins. Co. v. *Commonwealth*, 133 Mass. 161.

"This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

"The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicil. *Hoadley* v. *County Commissioners*, 105 Mass. 519. It enjoys no franchises conferred upon it by the Legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the Legislature.

"If this tax can be upheld, it seems to us that the necessary result will be that the Legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word 'commodities' beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the Legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people."

O'Keefe v. *Somerville*, 190 Mass. 110.

In this case, decided in 1906, and citing *Gleason* v. *McKay*, the same Court in a unanimous opinion held that a Massachusetts Act of 1904, attempting to impose an excise tax on the business of selling or giving trading stamps or similar devices in connection with the sale of articles, is unconstitutional and void, the right to transact business in this manner not being a commodity within the meaning of the word "commodities" in Const. Mass. c. 1, sec. 1, art. 4. While recognizing the constitutionality of succession taxes, and discussing fully the case principally relied on in the Government brief, of *Portland Bank* v. *Apthorp* (12 Mass. 252), the Court went on to say (pp. 112, 114), —

"It is not necessary in the present case to determine the meaning of the word 'commodities,' in reference to every possible application of it, but we

are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes (See *Thomas* v. *United States*, 192 U.S. 363.) we are of opinion that, under the limitation to commodities, the General Court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. . . ."

"Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law."

The case of *Gleason* v. *McKay* was under discussion and was affirmed (although that was not necessary to the decision) in —

Minot v. *Winthrop*, 162 Mass. 113, —

which was a case of a tax upon collateral legacies and successions.

And FIELD, *C.J.*, citing the case of *Gleason* v. *McKay*, says, (p. 121), —

"The defendant was a partnership, the peculiar feature of which was that by agreement between the partners the interest of each might be trans-

ferred in much the same manner as stock in an incorporated company. This peculiar feature was held not to be a commodity within the meaning of the Constitution."

Could a more exact vindication than this be found of the position taken by counsel for the appellant in *Flint* v. *Stone Tracy Company?*

Now both *Minot* v. *Winthrop* and *Gleason* v. *McKay* were carefully reviewed in —

Opinion of the Justices, 196 Mass. 603.

While three of the Justices in this case doubted whether *Gleason* v. *McKay* could be supported on the mere ground that an unincorporated association exercises no special privilege granted by the Legislature (196 Mass. 615), they quote with approval the words of the Court in *Minot* v. *Winthrop:*

> "It is to be noticed that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnership, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no special privileges derived from the Legislature. In *Portland Bank* v. *Apthorp* [12 Mass. 252], it was said of excises: 'Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed.' As the tax considered in *Gleason* v. *McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the Legis-

lature, the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact."

The other four justices in the opinion (*ubi supra*) definitely reaffirmed both *Gleason* v. *McKay* and *O'Keefe* v. *Somerville*. Thus, *Mr. Justice* RUGG (196 Mass. 620):

> "The proposed legislation levies a stamp excise tax upon all contracts of a certain class. It is imposed only upon the paper or writing, which is the evidence of the rights of the holder and is essential to their enforcement. It is not an excise upon the existence of the association or upon its holding of property. Such an excise would be unconstitutional under *Gleason* v. *McKay*, 134 Mass. 419."

And the other three justices, including KNOWLTON, *C.J.*, after an exhaustive review of the statutes on English taxation and early taxation in Massachusetts, by which it appears that, at least negatively, no such tax was ever imposed, say:

> "But none of these statutes implies that an excise tax may be laid upon a company, association, or partnership engaged in a simple business, like husbandry, merely because the members agree among themselves that their ownership shall be represented by transferable certificates of shares."

Unless, therefore, the appellees are prepared to maintain that the Federal Government is given wider and other powers of taxation by the Constitution, despite the Fifth Amendment, than are given to the Common-

wealth by the practically unlimited provisions for taxation in the Constitution of Massachusetts[1], the decisions of the Supreme Court of Massachusetts are decisive of the point that the "commodity" of having a capital stock represented by assignable shares is not taxable.

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[1] The Articles of the Mass. Const. are as follows (Part First, Article IV): —

"The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled."

And (Part Two, c. 1, sec. 1, Article IV): —

"And further, full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same;"